STATE OF MICHIGAN

COURT OF APPEALS

TERESA M. SULLIVAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2015
v	No. 326616 Midland Circuit Court Family Division
MICHAEL O. SULLIVAN, Defendant-Appellant.	LC No. 13-009495-DM

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

In this custody dispute, defendant, Michael O. Sullivan, appeals by right the trial court's order denying his motion for relief from the judgment of divorce. He maintains that the trial court erred by awarding joint legal and physical custody of the children to plaintiff, Teresa M. Sullivan. Because we conclude that the trial court did not err when it awarded the parties joint legal and physical custody, we affirm.

I. BASIC FACTS

Michael and Teresa Sullivan married in 2003 and have three daughters. Teresa is the Director of Student Life at Northwood University. During the majority of the parties' marriage, Michael was the Head Football Coach at Northwood. In 2013, Michael resigned from that position and began working as the Director of Enrollment for the university's Adult Degree Program.

According to Teresa Sullivan, Michael Sullivan was largely absent from the children's lives. She testified that while coaching he would leave early in the morning and not return until "eight or nine on a good night, and it could be 11 or 12 on another night." She, on the other hand, "would be home by five," with the exception of "some nighttime activities" at the university. She admitted, however, that Michael's current work schedule was "eight to five" with occasional travel. According to Michael, it was Teresa who was generally not home in the evenings. He testified that he would return home from work "between six and seven p.m.," but that she would work until "anywhere from six to midnight" at least two days a week.

Teresa Sullivan stated that she was responsible for the children's care "95 percent of the time." She testified that she was solely involved with the children as infants, actively involved in their school and community activities, and always responsible for arranging childcare. She also described Michael Sullivan as "very manipulative" and a "bully," stating that she and the children feared him and "tried so hard . . . to do everything, so he could just do what he needed to do." Michael contradicted Teresa's testimony, describing his involvement with the children as "a 50-50 breakdown." He characterized Teresa as "extremely controlling" and explained that he "would have to push to be involved in [his] daughters' lives." He testified that he participated in school and community activities, was solely responsible for the children when Teresa worked in the evenings, and handled the family's finances, medical appointments, cooking, and cleaning.

Teresa Sullivan sued for divorce in March 2013. The trial court held a child custody trial in May 2014. Teresa and Michael Sullivan both testified at the trial, along with two counselors and a teacher. The trial court also considered a custody specialist's report. After hearing the testimony and reviewing the report, the trial court awarded the parties joint legal and physical custody with "[p]rimary residency" to Teresa. It also awarded parenting time as agreed upon by the parties. In the event that the parties were unable to agree, the trial court provided that Michael's parenting time would consist of alternating weekends, a midweek three-hour period, and equal summer, extended break, and holiday time.

Michael Sullivan thereafter moved for reconsideration, arguing that the trial court's custody and parenting-time determinations were erroneous. He argued that, because the trial court did not reach a determination regarding the existence of an established custodial environment, its application of the burden of proof was in error. The court, "for purposes of judicial economy," granted Michael's motion and agreed to reevaluate its custody and parenting-time determinations after deciding whether an established custodial environment existed with one or both parents. The trial court determined that the children had an established custodial environment with their mother. Thus, it chose not to modify the judgment of divorce.

Michael Sullivan now appeals in this Court.

II. ANALYSIS

A. STANDARD OF REVIEW

In child custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotation marks and citations omitted). This Court defers to a trial court's credibility determinations and the trial court may accord different weight to the factors regarding the children's best interests. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "A trial court's determination on the issue of custody is reviewed for an abuse of discretion." *Maier v Maier*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 322109); slip op at 2. In relation to custody determinations, "an abuse of

discretion occurs if 'the result [is] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment by defiance thereof, not the exercise of reason but rather of passion or bias.' " *Id*.

As a preliminary matter, we must address Michael Sullivan's contention that this Court, in *Shulick v Richards*, 273 Mich App 320; 729 NW2d 533 (2006), erred when it concluded that the proper standard for determining whether a trial court abused its discretion in cases involving child custody is that set forth in *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). Acknowledging that we are bound by the decision in *Shulick*, see MCR 7.215(J)(1), he asks this Court to express disagreement as described in MCR 7.215(J)(2). We decline to do so for the same reasons we have declined to do so in the past. See, e.g., *Maier*, ___ Mich App at ___; slip op at 2.

B. ESTABLISHED CUSTODIAL ENVIRONMENT

Michael Sullivan also contends that the trial court erred when it found that the children had an established custodial environment with their mother.

"[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). "An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Berger*, 277 Mich App at 707. "The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c). "[A] party who seeks to change an established custodial environment of a child is required to show by clear and convincing evidence that the change is in the child's best interests." *Kessler*, 295 Mich App at 61.

The trial court's finding that the children had an established custodial environment with Teresa Sullivan was not against the great weight of the evidence. The testimony at trial demonstrated that "over an appreciable time," the children naturally looked to their mother, and not their father, for guidance, discipline, the necessities of life, and parental comfort. Teresa testified that she was responsible for 95 percent of the children's "day-to-day" care and that the children feared Michael Sullivan. While Michael's testimony contradicted Teresa's, the trial court resolved that dispute in favor of Teresa, and we will defer to the trial court's resolution. *Berger*, 277 Mich App at 705. Further, the children's counselor also testified to the children's relationship with both parents, providing even more evidentiary support for the trial court's finding. Hence, we cannot conclude that the trial court's finding concerning the established custodial environment clearly preponderated in the opposite direction. *Pierron*, 486 Mich at 85.

C. CUSTODY DETERMINATION

Because the trial court found that the children had an established custodial environment with their mother, the burden should have been on Michael Sullivan to prove by clear and convincing evidence that a change in custody was in the children's best interests. See MCL 722.27(1)(c). The trial court, however, appears to have placed the burden on Teresa Sullivan. Nevertheless, it found that the change in custody was satisfied by both a preponderance of the evidence and clear and convincing evidence. Consequently, even if the burden of proof was on Teresa at trial (which it should not have been), for the reasons more fully explained below, we conclude that the trial court did not abuse its discretion in awarding joint legal and physical custody with primary residence to Teresa.[1]

A trial court must resolve disputes over custody by determining what custody arrangement would serve the child's best interests; generally, a trial court determines the children's best interests by weighing the factors set forth in MCL 722.23. On appeal, Michael Sullivan challenges the trial court's findings with regard to the factors stated under MCL 722.23(a), (b), (d), (h), and (j).

1. FACTOR A

Relating to factor (a), "[t]he love, affection, and other emotional ties existing between the parties involved and the child," MCL 722.23(a), the trial court found that Teresa Sullivan was "clearly more connected emotionally with the children." Michael Sullivan claims that this finding was erroneous because both he and Teresa testified that he loved the children. However, the testimony presented at trial demonstrated that the children had a strong emotional tie with their mother and, to an extent, feared their father. It is apparent that the trial court found Teresa's testimony more credible than Michael's and we must defer to that determination. *Berger*, 277 Mich App at 705.

2. FACTOR B

Factor (b) concerns "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that Teresa was "slightly" favored under this factor on the basis of her ability to provide love and guidance to the children

[1] The trial court awarded the parties joint legal and physical custody and provided them each with extensive parenting time. A trial court may award a parent joint or sole legal custody and joint or sole physical custody. See *Dailey v Kloenhamer*, 291 Mich App 660, 669-670; 811 NW2d 501 (2011). And a "child whose parental custody is governed by court order has . . . a legal residence with each parent." MCL 722.31(1). Accordingly, it appears that the trial court's reference to a primary residence amounted to nothing more than an observation that, consistent with the parenting time order, the children would spend more time at their residence with their mother.

and Michael's "oppressive," "secondary," and "overly aggressive" approach to parenting. Michael claims that his approach is a valid form of discipline and that the court should have considered additional testimony. However, we cannot ignore the testimony demonstrating that the children feared him and that at least one child had concerns for her mother's safety. Further, the trial court apparently accepted that Teresa was responsible for the children's care for the majority of the time leading up to the divorce, but still found that this factor only "slightly" favored her. The trial court's finding on this factor was not contrary to the great weight of the evidence.

3. FACTOR D

Relating to factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial court found that the factor favored Teresa because she "has been the primary care provider." Michael claims that this is untrue because he was involved in the children's lives since birth and even more so since resigning as the university's football coach. Again, the testimony presented at trial, which was apparently credited by the trial court, demonstrated that Michael was largely uninvolved in the children's lives before the suit for divorce. The trial court recognized and commended Michael for becoming more involved in the children's lives since Teresa filed for divorce, but his factor specifically looks at "[t]he length of time" the children were living in a stable environment and, given the testimony, we cannot conclude that the trial court's finding was against the great weight of the evidence.

4. FACTOR H

The trial court found that factor (h), which examines "[t]he home, school, and community record of the child," MCL 722.23(h), favored Teresa on the basis of her active involvement in the children's school and community activities. Michael argues that the evidence showed that he was also heavily involved in the activities. However, the testimony presented at trial demonstrated that while Michael dropped the children off for school, attended occasional meetings, and volunteered Northwood football players for events, Teresa attended all meetings, volunteered for various events, and was at the children's school "weekly" and "any time she was needed." The evidence showed that Teresa played a substantial role in facilitating the children's education and daycare, and she was the parent primarily responsible for assisting the children with school work and other events. The trial court's finding was not against the great weight of the evidence.

5. FACTOR J

Finally, relating to factor (j), "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents," MCL 722.23(j), the trial court found that this factor favored both parties equally. Michael nevertheless claims that this finding too was erroneous because "[t]he testimony revealed that Plaintiff-Mother frequently attempted to limit Defendant-Father's involvement" and "refused to talk with Defendant-Father about custody issues, while he

was attempting to be flexible and fair." Deferring to the court's credibility determinations, *Berger*, 277 Mich App at 705, we conclude that Michael's assertion is without merit.

The trial court did not err in awarding joint physical and legal custody with primary residency to Teresa.

D. PARENTING-TIME

Additionally, we conclude that, even if the burden of proof was on Teresa Sullivan at trial, the trial court did not abuse its discretion in its parenting-time decision. "In awarding parenting time, it is the best interests of the children that control the determination of a parenting-time schedule." *Diez v Davey*, 307 Mich App 366, 389-390; 861 NW2d 323 (2014). The best-interest factors set forth in MCL 722.23 and the parenting-time factors set forth in MCL 722.27a(6) are relevant in parenting-determinations. *Id*. at 390, citing *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). "While custody decisions require findings under all the best-interest factors, when parenting time is at issue, the trial court need only make findings on contested issues." *Diez*, 307 Mich App at 390. In reaching its decision, the trial court considered all of the best-interest factors set forth in MCL 722.23 and all of the parenting-time factors set forth in MCL 722.27a(6).

In this case, the trial court ordered parenting time as agreed on by the parties. In the event that the parties were unable to agree, the judgment of divorce provided the following parenting-time schedule for Michael Sullivan: alternating weekends with parenting time from 6:00 p.m. on Friday until Monday morning when he drops the children off at school or daycare during the school year; one three-hour midweek visit; and equal summer, holiday, and extended break parenting time.

Michael Sullivan specifically takes issue with the trial court's analysis of the parenting-time factors set forth in MCL 722.27a(6). He claims that there will be an abrupt loss of parenting time because the children have "spent their entire lives . . . regularly seeing their father every day or at least in an amount equal to seeing their mother." However, as discussed above, the testimony presented at trial demonstrated that for a considerable portion of the children's lives, Michael spent a significant amount of time away from home. And, even when he was at home, he was not directly involved with the children. It was Teresa Sullivan, not Michael, who spent the majority of the time with the children. The court's best-interest determination was not "palpably or grossly violative of fact and logic." *Maier*, ___ Mich App at ___; slip op at 2.

Michael Sullivan also challenges the fact that the trial court's parenting-time decision grants him less parenting time than was recommended by the child custody specialist. The specialist recommended that he have parenting time on "extended" alternating weekends, i.e., Thursday night to Monday morning. Instead, the trial court awarded him alternating weekends, i.e., Friday night to Monday morning. The court considered this recommendation in connection with the other testimony presented at trial. By way of an example, the two oldest children's counselor testified that, in her professional opinion as a therapist, she would recommend that Michael have *zero* overnights. While she did believe that parenting time with both parents was ideal, she opined that an equal parenting-time schedule was "too much." The trial court is not

bound by the recommendation of the child custody specialist. Thus, in light of the whole record, the trial court's decision not to follow the specialist's recommendation was not error.

Michael Sullivan has not demonstrated that the trial court erred when it determined custody and established a parenting time schedule.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro